89-1195

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1989

ST. JOSEPH HOSPITAL,
Petitioner,

v.

THE CELOTEX CORPORATION and
UNITED STATES GYPSUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 1990

QUESTIONS PRESENTED

Does the retroactive application of a change in a state statute of limitations, which extinguished a cause of action, violate the due process and equal protection clauses of the fourteenth amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.[1]

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[1] Pursuant to Rule 28.1, petitioner lists the following parent and affiliated corporations. St. Joseph Center For Life, Inc., St. Joseph Hospital, Augusta, Georgia, Inc., St. Joseph Urgent Care Centers, Inc., St. Joseph Foundation, Inc., St. Joseph Rehabilitation Real Estate Company, and St. Joseph Rehabilitation Operating Company.

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v.

THE CELOTEX CORPORATION and
UNITED STATES GYPSUM COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner St. Joseph Hospital respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered June 6, 1989.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 874 F.2d 764 (11th Cir. 1989), and is reprinted at Appendix A, 1a. The order of the district court denying respondents' motion for summary judgment on the statute of limitations issue is unreported, and is reprinted at Appendix B, 5a. An earlier order certifying a question to the Georgia Supreme Court is reported at 854 F.2d 426 (11th Cir. 1988), and is reprinted at Appendix C, 24a. The order of the Georgia Supreme Court on the certified question is reported at 259 Ga. 108, 376 S.E.2d 880 (Ga. 1989), and is reprinted at Appendix D, 36a. The judgment below is reprinted at Appendix E, 45a. The order denying rehearing is reported at 887 F.2d 1093 (11th Cir. 1989), and is reprinted at Appendix F, 48a.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989, and a timely petition for rehearing was denied on September 15, 1989. On December 1, 1989, Justice Kennedy extended the time for filing this petition to January 15, 1990. The jurisdiction of this Court arises under 28 U.S.C. Sec. 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause and Equal Protection Clause (14th amendment, section 1):

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ga. Code Ann. § 9-3-30:

> "All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues."

STATEMENT OF THE CASE

On March 10, 1986, petitioner St. Joseph Hospital filed this lawsuit in the United States District Court for the Southern District of Georgia, alleging that it had been injured by asbestos installed by the respondents Celotex Corporation and the United States Gypsum Company. Petitioner sought to recover the cost of its asbestos removal from these respondents.

The applicable Statute of Limitations in this case, O.C.G.A. § 9-3-30, provides a four-year period for suits involving damage to realty, but the critical question is when the four-year period starts running.

The record showed that although the asbestos was installed some years earlier, petitioner was not aware of any injury until March 1984 -- less than four

years before it filed suit in 1986. Moreover, the record contained no evidence of building contamination within four years of completion so petitioner could not have maintained its lawsuit within four years of building completion.

Respondents moved for summary judgment in the district court on the ground that the four-year statute should be measured from the time the asbestos was installed, even though that was years before petitioner discovered the asbestos hazard. The district court denied the motion and held that under the explicit law of Georgia, the statute of limitations was governed by the "Discovery Rule" and did not begin running until the petitioner discovered or should have discovered that it had an injury.

Following a five-day trial, the jury rendered a verdict for petitioner and awarded $500,000.00 in compensatory damages.

Both respondents appealed, and while the appeal was pending, the court of appeals (in another case) certified to the Georgia Supreme Court the question of when the statute of limitations starts running.[2] The Georgia Supreme Court responded to the certified question by overruling its prior law and holding that the Discovery Rule does not apply to property damage cases. Thus, according to the new Mercer University rule, an action under O.C.G.A. § 9-3-30 must be brought within four years of "substantial completion" of construction, even if a plaintiff did not know of the defect, or if a defendant had knowledge of the defect and concealed it.

On June 6, 1989, the court of appeals held, in light of the Georgia Supreme Court's answer to the certified question, that the time when petitioner

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[2] The question was certified in Corporation of Mercer University v. National Gypsum Co., 832 F.2d 1233 (11th Cir. 1987), and was answered by the Georgia Supreme Court in Corporation of Mercer University v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (Ga. 1988).

discovered its injury was irrelevant, and this case must be dismissed because it was filed more than four years after the asbestos was installed.[3] This petition follows.

REASONS FOR GRANTING THE WRIT

It has been clear for more than a century that statutes of limitation cannot constitutionally be applied to extinguish a cause of action without giving its holder a meaningful opportunity to act on it. The court below contradicted that fundamental rule by retroactively applying the Mercer University decision which effectively extinguished petitioner's cause of action.

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[3] While the appeal below was pending, the court of appeals in this case certified another question to the Georgia Supreme Court, asking whether a new Georgia statute preserving or reviving certain asbestos-related actions, O.C.G.A. Sec. 9-3-30.1, was intended to apply retroactively. St. Joseph Hospital v. The Celotex Corporation, 854 F.2d 426 (11th Cir. 1988). Rather than answering that question, the Georgia Supreme Court held the revival statute was unconstitutional as special legislation. St. Joseph Hospital v. The Celotex Corporation, 259 Ga. 108, 376 S.E.2d 880 (Ga. 1989).

As this Court said 99 years ago:

> "It is the settled doctrine of this Court that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. Wheeler v. Jackson, 137 U.S. 245, 255, (1890). (emphasis added)"

A few years later, the same theme was repeated in Wilson v. Iseminger, 185 U.S. 55, 62 (1902):

> "It may be properly conceded that all Statutes of Limitation[s] must proceed on the idea that a party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a Statute of Limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions."

Beginning at least as early as 1972, Georgia has had a Discovery Rule for statutes of limitations

applicable to injuries that could be latent or continuing. Thus, in Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425 (Ga. 1972), the Georgia Supreme Court said:

> "Today we recognize and extend this theory, as here explained, to those factual situations analogous to the situation here involved where any negligent or tortious act is a continuing nature and produces injury in varying degrees over a period of time." [194 S.E.2d at 428.]

In the years following Everhart there were numerous cases affirming the Discovery Rule.[4] Although these decisions in terms applied to O.C.G.A. § 9-3-33 (injuries to the person), the language of O.C.G.A. § 9-3-30 (injuries to realty) was similar, and in 1985 the Georgia Supreme Court in Lumbermen's Mut.

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[4] Forgay v. Tucker, 128 Ga.App. 497, 500, 197 S.E.2d 492 (Ga.App. 1973); Piedmont Pharmacy v. Patmore, 144 Ga.App. 160, 240 S.E.2d 888 (Ga.App. 1977); Marbut v. P.P.G. Industries, Inc., 148 Ga.App. 721, 252 S.E. 2d 628 (Ga.App. 1979); Simons v. Conn, 151 Ga.App. 525(2), 260 S.E.2d 402 (Ga.App. 1979); Morgan v. Carter, 157 Ga.App 218, 276 S.E.2d 889 (Ga.App. 1981); King v. Seitzingers, 160 Ga App 318, 287 S.E.2d 252 (Ga. 1981); Anderson v. Sybron Corp, 299 S.E.2d 160 (Ga App 1983) aff'd., 251 Ga. 593, 310 S.E.2d 232 (Ga 1983)

Cas. Co. v. Pastillo Const., 254 Ga. 461, 330 S.E.2d 334 (Ga. 1985), explicitly held that the Discovery Rule applied to tort actions for damage to realty under O.C.G.A. § 9-3-30.

Georgia courts subsequently discussed or applied the Discovery Rule to property damage claims, and consistently cited Lumbermen's as precedent. Steele v. Goldkist, Inc., 186 Ga. App. 569, 368 S.E.2d 196 (Ga.App. 1988); Bowen & Bowen, Inc. v. McCoy-Gibbons, 185 Ga.App., 298, 363 S.E.2d 827 (Ga.App. 1987); Webster v. Snapping Shoals Elec. Membership, 176 Ga.App. 265, 355 S.E.2d 637 (Ga.App. 1985).

Thus, when petitioner filed this suit in 1986, Georgia law unquestionably provided a Discovery Rule under which the suit was timely. In these circumstances, petitioner was entitled to rely on the existence of the Discovery Rule rather than take some other course such as filing its suit in a different state. When the Discovery Rule was abolished by the Georgia

Supreme Court in 1988 by the Mercer University decision, petitioner's cause of action was retroactively extinguished as effectively as if the Georgia Legislature had simply passed a new statute shortening the statute of limitations -- without allowing a savings period. That action denied petitioner due process as recognized in this Court's decisions in Wheeler v. Jackson and Wilson v. Iseminger, supra.[5]

This is not a case where the Georgia Supreme Court reaffirmed a long-standing rule denying the existence of a Discovery Rule. Rather, St. Joseph Hospital had a cause of action which accrued in 1984, was viable under the law that existed through trial, and was retroactively extinguished by a post-trial change in the law. The first notice St. Joseph had that a Discovery Rule was not the law in Georgia was long after its trial had concluded.

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[5] A cause of action is a constitutionally-protected form of property. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Moreover, the due process violation is aggravated by the fact that the new rule adopted and retroactively applied in this case irrationally differentiates between two indistinguishable litigants. i.e., between persons with personal injuries whose statute of limitations starts running only upon discovery of the injury, and persons with property damage like petitioner whose statute of limitations starts running and may well end years before discovery.

This Court and other courts have made clear that there is an inevitable degree of arbitrariness in each state's pattern of different statutes of limitation. Nonetheless, differences among statutes governing similar injuries must be shown to have a rational basis, and a statute that fails the test will be struck down. See, e.g., Broome v. Truluck, 270 S.C. 272, 241 S.E.2d 739 (S.C. 1978), where the South Carolina Supreme Court struck down a discriminatory statute of limitations, and cited cases from other states which had

done likewise. The different treatment of personal injuries to the person and personal injuries to property is a distinction that fails the test.[6]

The retroactive application of this arbitrary distinction violates both the due process and equal protection clauses of the fourteenth amendment.

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[6] If the distinction is claimed to be that "personal rights" are valued higher than "property rights," the answer is that "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). This is especially true in this case. St. Joseph Hospital is a non-profit, charitable hospital whose mission is to provide medical care to persons, many of whom have limited resources. If Georgia has an interest in personal rights and personal injuries, that is precisely what this case involves.

CONCLUSION

The issue presented affects not only petitioner but many other litigants as well. Petitioner respectfully urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8140

ST. JOSEPH HOSPITAL,
Plaintiff-Appellee

V.

The CELOTEX CORPORATION, as Successor
to the Spraycraft Corporation
(a Delaware Corporation),
UNITED STATES GYPSUM COMPANY
(a Delaware Corporation),
Defendants-Appellants.

JUNE 6, 1989

Appeal from the United States District
Court for the Southern District of Georgia

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

St. Joseph Hospital filed an action in district court on March 10, 1986 against four manufacturers of fireproofing material containing asbestos. This material was sprayed in St. Joseph's building in the course of renovations in 1969 and 1970. St. Joseph discovered the asbestos in 1984 and brought this action to recover its cost of removing the asbestos-containing material. The defendants moved for summary judgment asserting that the claim was barred by the four-year statute of limitations. See Ga.Code Ann. § 9-3-30 (1982). The district court denied the motion on the ground that Georgia's discovery rule prevented the limitations period from beginning to run until St. Joseph knew or reasonably should have known that the asbestos material was a hazard requiring removal. After a trial lasting several days the jury found for the plaintiff. The defendants appealed.

Under Ga.Code Ann. § 9-3-30, the statute of limitations for plaintiff's claim was four years after the right of action accrued. The Georgia Supreme Court has answered our certified question in a similar case that the discovery rule in Georgia applies only to personal injury cases. Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988). Accordingly, the statute of limitations for plaintiff's claim was not tolled.

While this case was pending, the Georgia legislature enacted a statute that extended the statute of limitations for commencing suits against suppliers or manufacturers of material containing asbestos. Ga.Code Ann. § 9-3-30.1 (1982). This statute became effective April 14, 1988. The statute was unclear, however, if it applied to pending suits. Accordingly, we certified this question to the Georgia Supreme Court.

In response, the Georgia Supreme Court has answered that section 9-3-30.1 is unconstitutional. Its decision is published at 376 S.E.2d 880.

Plaintiff's claim is thus governed by the statute of limitations of Ga.Code Ann. § 9-3-30. It was not timely filed under this statute and the discovery rule does not apply to toll the statute of limitations period. Accordingly, the judgment of the district court in favor of plaintiff is reversed and this case is remanded to the district court for entry of judgment for defendants.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action Number 186-047

ST. JOSEPH HOSPITAL,
Plaintiff,

V.

THE CELOTEX CORPORATION, et al.,
Defendants.

ORDER

This is a hybrid personal injury/property damage suit brought by St. Joseph Hospital against defendant asbestos manufacturers to recover the costs of removing asbestos-containing fireproofing allegedly sold by defendants. Plaintiff advances a variety of recovery theories based on the claim that its property was damaged because the presence of defendants' products constituted a hazard to occupants of the building. United States Gypsum Company ("USG") and Celotex

Corporation ("Celotex") move for summary judgment on behalf of all defendants on the grounds that the plaintiffs claims are barred by the applicable four-year statute of limitations. See O.C.G.A. §§ 9-3-30, 9-3-31. The building in question was built and the asbestos fireproofing installed during 1969-70. Since then, various renovation projects have been undertaken. This action was brought on March 10, 1986. Defendants claim that plaintiff was aware of its

alleged injury as early as 1969, while plaintiff professes not to have known of its injury until 1984. The question before the Court on motion for summary judgment is whether the evidence presents a material issue of fact as to whether plaintiff knew of its injury more than four years before bringing this action. Because the Court concludes such a material issue remains to be decided by the jury, summary judgment will be denied.

DISCUSSION

This action arises under the Court's diversity jurisdiction; accordingly, the law of Georgia must be applied in determining the applicable statute of limitations. Jamison v. Cooper, 754 F.2d 1568 (11th Cir. 1985); Blue v. Maico, 217 F.Supp. 747 (N.D.Ga. 1963). Since defendants have moved for summary judgment on the issue of the statute of limitations, they bear the burden of showing that under Georgia law the statute bars plaintiff's claims. Celotex Corp. v. Catrett, 477 U.S. ____, 91 L.Ed. 267, 274, 106 S.Ct. _____ (1986). In considering the facts presented, the Court must resolve all doubts and inferences in favor of the non-moving party. Williams v. City of Dothan, Ala., 745 F.2d 1406, 1410 (11th Cir. 1984).

Defendants first assert that plaintiff's cause of action arose at the time the asbestos-containing products were first installed, in 1969-70. Millard Mathews Builders, Inc. v. Plant Improvement Co., 167

Ga.App. 855 (1983). If this were so, plaintiff's 1986 claim would be clearly barred as filed after the expiration of the statutory period. However, the rule in Millard Mathews was modified by Lumberman's Mutual Casualty Co. v. Pattillo Construction Co., 254 Ga. 461 (1985). Lumberman's applied Georgia's "discovery rule" to certain kinds of actions for damages to property. According to this "discovery rule," a cause of action for a continuing tort is said to have arisen only after plaintiff has discovered or reasonably should have discovered the nature and the cause of injury. Id. at 463. See also McAulen v. Wills, 251 Ga. 3, 4 (1983). Lumberman's was a split decision, however, with the tie-breaking Justice holding that the discovery rule would be extended to property damage cases only where there was an applicable "statute of repose." Id. at 466. Defendants observe that no such statute of repose applies to plaintiff's claims and urge the

conclusion that the discovery rule is not available to permit the hearing of plaintiff's claim.

In a previous case based on similar facts, however, this Court held the Lumberman's was not controlling -- largely because that case involved a continuing tort and was more analogous to a personal injury action, to which the discovery rule must be applied. The Corporation of Mercer University v. National Gypsum, Civil Action No. 85-126-3-MAC, slip op. at 7 (M.D.Ga. March 9, 1986).

Just as in the Mercer case, plaintiff's negligence claim here alleges a failure to warn and a failure to test, both of which are continuing torts under Georgia law. Everhart v. Rich's Inc., 229 Ga. 798 (1972). Furthermore, like Mercer, this action is a hybrid personal injury/property damage case in that the damage to plaintiff's property arises from the presence of asbestos materials capable of inflicting injuries to persons. Since the discovery rule clearly applies to

personal injury claims based on allegations of a continuing tort, King v. Seitzingers, 160 Ga.App. 318, 320 (1981), and a slim majority of the Georgia Supreme Court would apply the rule to certain property damage cases as well, this Court is of the opinion that plaintiffs in a hybrid cause of action such as this would also be given the benefit of the discovery rule under Georgia law.

Defendants take a narrow view of the Everhart case and maintain that the continuing nature of a tort such as failure to warn does not require the application of the discovery rule except in cases where the giving of an adequate warning would prevent the injury. Defendants maintain that plaintiff's injury, if any, occurred on installation of the asbestos so that, under their reading of Everhart, any post-installation warning would not have prevented the injury. The Court is unpersuaded by defendants' interpretation of Everhart and unconvinced by their argument that a post-

installation warning would not have at least mitigated plaintiff's actual injury. Although USG alleges that this Court adopted their view of Everhart during the Mercer trial, the passage of the trial transcript relied on by USG reveals no such express adoption. In any event, on further examination, the Court concludes that defendants' view is incorrect.

To be specific, Everhart, did not hold, as defendants suggest, that the discovery rule applied only where the warning would have prevented the injury. On the contrary, the Everhart court held that, even though a plaintiff has already experienced an ascertainable injury from a hazard that should have been warned against, the failure to warn:

> ... is nevertheless a tort of a continuing nature which tolls the statute of limitations so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim, and the statute of limitations does not commence to run under these circumstances until such time as the

> tortious act is eliminated, e.g. by an appropriate warning in respect to the hazard.

Everhart, supra at 802.

Under Everhart, it is not necessary that a warning actually prevent the injury in order for the failure to warn to toll the statute. Rather, the statute will be tolled for as long as a failure to warn allows "continued exposure to the hazard." Id. Applying this rule to the case at bar, it is arguable that the defendants' alleged failure to warn occasioned plaintiff's continued exposure to the hazard resulting from the presence of asbestos in plaintiff's building. Once warned, plaintiff most likely would have been encouraged to begin abatement of the asbestos materials in order to reduce the hazard. It is at least plausible, then, that a warning would have lessened the degree of plaintiff's injury, by decreasing both the exposure time and the extra costs that would have resulted from removing the asbestos at a later time.

To recapitulate defendants' statute of limitations arguments treated thus far, they contend: first, that the cause of action arose upon installation; second, that the discovery rule should not be applied under Lumberman's; and, third, that the nature of failure to warn as a continuing tort should not toll the statute on these facts. For all of the foregoing reasons, the Court finds that the discovery rule should be applied here and that defendants' alleged continuing failure to warn did toll the statute until such time as plaintiff discovered the nature and cause of its injury.

Defendants' fourth argument is that, even if the discovery rule is held to apply, plaintiff's claim is still barred because plaintiff knew or reasonably should have known both the nature and cause of its injury more than four years before bringing this lawsuit. In essence, under the discovery rule, the statutory period does not begin to run until a plaintiff "knew, or through the exercise of reasonable diligence should have

discovered, not only the nature [identity] of his injury but also the causal connection between the injury and the alleged negligent conduct of defendant." Lumberman's, supra at 463.

Regarding the causation element of plaintiff's knowledge, defendants submit that plaintiff knew or reasonably should have known that its facilities contained asbestos. Indeed, the 1969 architect's specifications for the construction of St. Joseph Hospital call for the use of spray-on fireproofing made from asbestos. Plaintiff responds that such knowledge may be imputed to plaintiff's architect but not necessarily to plaintiff. Nevertheless, after examining the evidence, the Court concludes that there is no genuine issue of material fact concerning whether plaintiff knew that its building contained asbestos and that some dangers were generally associated with asbestos at a time more than four years before filing suit.

But nothing in the record demonstrates conclusively that plaintiff knew or reasonably should have known that the presence in plaintiff's building of undisturbed asbestos fireproofing constituted a hazard requiring removal. This is the "particular injury" for which plaintiff seeks to recover. See Anderson v. Sybron Corp., 165 Ga.App. 566, 568 (1983). The evidence in the record is somewhat ambiguous as to when plaintiff knew of its injury; however, it is clear that, in order to have discovered the cause of this particular injury, plaintiff must have known that the erosion of asbestos in its building presented such severe hazards that some remedy had to be sought. Whether plaintiff had such knowledge at a time more than four years before the bringing of this lawsuit remains an unresolved material issue of fact.

Although defendants cite depositions of hospital officials who allegedly admit being aware of the general hazards associated with asbestos, the record also

shows that plaintiff had not discovered the hazard resulting from the mere existence of asbestos until approximately 1984. See Dep. of James Moorehead at 77, 83-84. If taken as true, this alleged discovery of the nature of plaintiff's injury would start the statute of limitations period running in 1984. Since plaintiff filed only two years later, on March 10, 1986, the claim would fall well within the four-year statutory period of O.C.G.A. § 9-3-30.

The Court finds, therefore, that a genuine question of material fact exists as to whether plaintiff discovered the nature and the cause of its injury at a time falling within the four-year limitations period preceding March 10, 1986.

Turning now to defendants' arguments regarding the specific counts of failure to warn and fraud, these claims may be considered in light of the preceding analysis. Defendants maintain that their products contained warnings that were sufficient to put plaintiff

on notice of any hazard more than four years before plaintiff brought this suit. Yet no defendant asserts that it warned that the mere undisturbed presence of their product in a building could be hazardous to the occupants. It follows, then, that the adequacy of defendants' warnings is at issue here and the jury will need to determine whether the warnings were sufficient to put plaintiff on notice of the nature of its injury. Rhodes v. Interstate Battery System of America, 722 F.2d 1517, 1519 (11th Cir. 1984).

Similarly, defendants argue they cannot be held liable for fraud because the four-year statute of limitations begins to run once a party is on notice of the fraud or reasonably could have discovered the fraud. See, e.g., Owen v. Mobley Construction Co., 171 Ga.App. 462, 463 (1984); Gerald v. Doran, 169 Ga.App. 22, 23 (1983); O.C.G.A. §§ 9-3-31, 9-3-36.

Plaintiff alleges that defendants committed fraud and made misrepresentations by falsely stating that

their products were suitable for use in public buildings and inducing plaintiff to purchase their products in reliance on these statements. Defendants contend that their statements were not false, also that plaintiff knew of the hazards associated with asbestos and that its building contained asbestos. In order for plaintiff to "discover the fraud" under these circumstances, plaintiff would have had to determine that defendants' products were in fact unsuitable for use in public buildings. Such a discovery would then commence the limitations period. While defendants again cite deposition testimony of hospital officials and employees allegedly showing that plaintiff knew that asbestos presented health hazards, there is no evidence of plaintiff's knowledge that asbestos in undisturbed form was unsuitable for use in public buildings. Thus, as in the case of failure to warn, there remains a genuine issue of material fact as to whether or not plaintiff was on

notice of the fraud more than four years before bringing this action.

A final consideration relevant to the question of plaintiff's knowledge of injury is raised by the notice effect of the National Emissions Standards for Hazardous Air Pollutants ("NESHAPS") regulations, which were promulgated by the Environmental Protection Agency ("EPA") in 1973. See 40 C.F.R. § 61.145 et seq. (1986).

These regulations require the removal of asbestos, and define safety procedures to be followed, if a building with friable asbestos-containing products is to be renovated or demolished. Defendants allege that plaintiff undertook several renovation projects in areas containing asbestos between 1977 and 1981. The application of the NESHAPS regulations to these renovation projects should have put plaintiff on notice as to the hazardous nature of asbestos, according to

defendants, and such notice at that time would place this suit well outside the limitations period.

A review of these regulations, however, does not disclose support for defendants' conclusions. The regulations do not intimate that the presence of asbestos-containing fireproofing in a building presents a hazard. On the contrary, the regulations apply only to renovation or demolition projects that contemplate the crumbling or pulverizing of asbestos materials. The apparent purpose of these regulations is to reduce the hazards arising from asbestos-containing products which are torn down or knocked apart, with the potential of releasing asbestos fibers into the air. If anything, regulations negate the inference that asbestos products present a hazard if left undisturbed.

In summary, the evidence thus far presented fails to show that plaintiff knew or reasonably should have known it suffered an injury more than four years prior to the instigation of this lawsuit. Without having

demonstrated such knowledge, defendants have not borne their burden of showing that no issue of material fact remains regarding whether plaintiff's claim is barred by the statute of limitations.

CONCLUSION

In accordance with the foregoing, defendants' motions for summary judgment based on the statute of limitations are hereby DENIED.

SO ORDERED, this 6th day of November, 1986.

/s/Anthony A. Alaimo
Chief Judge,
United States District Court
Southern District of Georgia

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8140

ST. JOSEPH HOSPITAL,
Plaintiff-Appellee

V.

The CELOTEX CORPORATION, as Successor
to the Spraycraft Corporation
(a Delaware Corporation),
UNITED STATES GYPSUM COMPANY
(a Delaware Corporation),
Defendants-Appellants.

SEPT. 6, 1988

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit sitting by designation.

PER CURIAM:

This appeal involves the applicability of a statute recently enacted by theGeorgia legislature. Because of the importance of this issue of Georgia law to the resolution of several pending lawsuits,we believe that the Georgia Supreme Court should have the opportunity to address the issue. We therefore certify the question to the Supreme Court of Georgia pursuant to Ga. Const. art. 6, § 6, para 4, Ga.Code Ann. § 15-2-9 and Rule 37 of the Georgia Supreme Court.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO ARTICLE VI SECTION VI PARAGRAPH IV OF THE GEORGIA CONSTITUTION.

TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES OF THAT COURT:

I. Style of the Case

The style of the case in which this certificate is made is as follows: St. Joseph Hospital, Plaintiff-Appellee, versus the Celotex Corporation and United

States Gypsum Company, Defendants-Appellants, Case No. 87-8140, filed in the United States Court of Appeals for the Eleventh Circuit, on appeal from the United States District Court for the Southern District of Georgia.

II. Statement of the Facts

On March 10, 1986 St. Joseph Hospital filed an action in federal district court against four manufacturers of asbestos-containing fireproofing sprayed in its building. Among these manufacturers were appellants Celotex Corporation and United States Gypsum Company. The fireproofing materials had been applied to steel beams in the hospital during a renovation project undertaken during 1969 and 1970. The asbestos was not discovered until March 1984, when the hospital initiated a subsequent renovation.

The hospital removed the asbestos-containing material, and brought this action to recover the cost of the removal.

The defendants moved for summary judgment on the ground that the plaintiff's claims were barred by the four-year statute of limitations. See Ga.Code Ann. § 9-3-30. The district court denied the motion on the ground that Georgia's discovery rule prevented the limitations period from commencing to run until St. Joseph knew or reasonably should have known that the asbestos fireproofing constituted a hazard requiring removal. After a five day trial the jury returned a verdict against Celotex for $300,000 and against USG for $200,000. The two defendants appealed.

III. Reasons for Certification

This case, like several others involving asbestos damage to buildings, involved Georgia's discovery rule. This rule provides that a cause of action in tort will not

accrue until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he has been injured and that the injury may have been caused by the defendant. King v. Seitzingers, Inc., 160 Ga.App. 318, 287 S.E.2d 252, 254 (1981). At the time the parties argued the case before this court, the issue was whether the discovery rule applied to tort actions involving injury to property as well as to those involving personal injury.

Ga.Code Ann. § 9-3-30, the statute of limitations applicable when the case was before the district court, provides that the action must be brought within four years after the right of action accrues. In Corporation of Mercer Univ. v. National Gypsum Co., 832 F.2d 1233 (11th Cir. 1987), which was argued before this case was argued, we certified to the Georgia Supreme Court

the question of whether the discovery rule applies to property damage cases.[1]

The Georgia Supreme Court answered the certified question in the negative. See Corporation of Mercer University v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988). The court held that the discovery rule in Georgia is confined to personal injury cases. Id. 368 S.E.2d at 733. The court concluded, therefore, that a cause of action under the Ga.Code Ann. § 9-3-30 must be brought within four years of

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[1] The question certified to the Georgia Supreme Court asked: "Whether the discovery rule is applicable to property damage cases where there is no applicable statute of repose but there are knowledge and concealment of hazardous defects?" 832 F.2d at 1236.

The question was phrased this way because there was some precedent in the courts of Georgia for the proposition that where there exists an applicable statute of repose, the discovery rule would apply in property damage cases. See Lumberman's Mut. Cas. Co. v. Pattillo Constr. Co., Inc., 254 Ga. 461, 330 S.E.2d 344 (1985). There was also some authority for the position that the discovery rule might still apply, even without the existence of an applicable statute of repose, where there were allegations of knowledge and concealment of hazardous defects. See Mercer, 832 F.2d at 1235-36; U-Haul Co. of W. Georgia v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497, 499 (1981).

substantial completion of the damaged building or property. See id., 368 S.E.2d at 733.

While the case was pending before the Georgia Supreme Court, however, the Georgia legislature enacted a new statute governing actions against asbestos manufacturers and suppliers involving property damage. The new statute, Ga.Code Ann. § 9-3-30.1, which was signed by the governor and became law on April 14, 1988, provides:

> (a) Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:
>
> (1) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

This statute, if applied to cases like this one, would lift any statute of limitation bar. The Georgia Supreme Court, however, did not consider the effect of this statute on Mercer's claim.[2]

Appellants argue that the new statute does not apply "retroactively" to cases filed prior to April 14, 1988, the effective date of the new statute. Appellants maintain that the four year statue of limitations of Ga.Code Ann. § 9-3-30 applies (sans discovery rule) to all cases, like this one, filed prior to April 14, 1988.

Appellants, citing Hart v. Owens-Illinois, Inc., 250 Ga. 397, 297 S.E.2d 462 (1982), argue that because the language of Ga.Code Ann. § 9-3-30.1 does not "imperatively" require retroactive application, the statute should not apply to pending cases.[3] Appellants

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[2] On June 20, 1988 Mercer University filed a motion for reconsideration in the Supreme Court of Georgia, urging that the court apply Ga.Code Ann. § 9-3-30.1. The Georgia Supreme Court denied the motion on July 1.

[3] In Hart, the Georgia Supreme Court held that courts should not construe a statute to apply retroactively unless the language of the statute requires it. 297 S.E.2d at 463. The

specifically point to the language that any action under the new statute "shall be commenced" before July 1, 1990 as connoting application only to lawsuits commenced after the enactment of the new statute.[4]

We believe that it is appropriate for the Georgia Supreme Court to resolve this issue. As we noted in our previous opinion, these cases involve considerable amounts of money, and this court has a strong interest in faithfully applying Georgia law with scrupulous accuracy. Accordingly, we certify the issue of the new

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court in Hart held that a statute of limitations enacted after the right of action had vested in the plaintiff would not be applied to bar the plaintiff's claim. This case presents the converse issue: whether a statute which revives or extends actions otherwise barred by a statute of limitation should not be applied to allow the plaintiff's claim.

[4] Appellants also argue that the Georgia Supreme Court's opinion in Mercer resolves the issue. The defendants in Mercer argued to the Georgia Supreme Court that the court should decline to address the new statute because the issue was not relevant to the question certified by this court. The defendants in this case now argue that the Georgia Supreme Court's failure in Mercer to address the applicability of the new statute "conclusively resolved the issue." We do not, however, view such silence as resolution of such an important issue.

statute's interpretation and applicability to pending cases.[5]

IV. Question to be Certified to the Georgia Supreme Court

Whether Ga.Code Ann. § 9-3-30.1 applies to cases pending at the time of the statute's enactment so as to prevent these claims from otherwise being barred by an applicable period of limitation?

The entire record in the case, together with the briefs of the parties, is transmitted herewith.

QUESTION CERTIFIED.

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[5] We are reluctant to certify a second question in this series of Georgia asbestos property damage cases. We feel, however, that the importance of the issue and the strong interests of the Georgia courts in this area require us to do so.

APPENDIX D

SUPREME COURT OF GEORGIA

No. 46200

CELOTEX CORP., et al.

V.

ST. JOSEPH HOSPITAL

MARCH 2, 1989

Reconsideration Denied March 2, 1989.

PER CURIAM:

The Certified Question

The United States Court of Appeals for the Eleventh Circuit certified the following question to this court: "Whether [OCGA] § 9-3-30.1 applies to cases pending at the time of the statute's enactment so as to prevent these claims from otherwise being barred by

an applicable period of limitation?" St. Joseph Hospital v. Celotex Corp., 854 F.2d 426 (1988).

On March 10, 1986 St. Joseph Hospital filed an action in federal district court against four manufacturers of asbestos-containing fireproofing sprayed in its building. Among these manufacturers were appellants Celotex Corporation and United States Gypsum Company. The fireproofing materials had been applied to steel beams in the hospital during a renovation project undertaken during 1969 and 1970. The asbestos was not discovered until March 1984, when the hospital initiated a subsequent renovation. The hospital removed the asbestos-containing material, and brought this action to recover the cost of removal.

The defendants moved for summary judgment on the ground that the plaintiff's claims were barred by the four-year statute of limitations. See [OCGA] § 9-3-30. The district court denied the motion on the ground that Georgia's discovery rule prevented the limitations

period from commencing to run until St. Joseph knew or reasonably should have known that the asbestos fireproofing constituted a hazard requiring removal. After a five day trial the jury returned a verdict against Celotex for $300,000 and against USG for $200,000. The two defendants appealed. Id.

OCGA § 9-3-30.1, effective April 14, 1988, provides:

> (a) Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:
>
> (1) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;
>
> (2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

Our Responses

We find that OCGA § 9-3-30.1 constitutes a special law within the meaning of Art. 3, Sec. 6,

Para.4(a) of the Constitution of Georgia of 1983, which provides: "Laws of a general nature shall have uniform operation throughout the state and no local or special law shall be enacted in any case for which provision has been made by an existing general law...."

OCGA § 9-3-30.1, like the statute at issue in Lasseter v. Ga. Public Service Commission, 253 Ga. 227, 319 S.E. 2d 824 (1984),

> deals with a limited activity in a specific industry during a limited time frame.... To designate this as a general law would amount to the acceptance of a fiction which would strain the credibility of the court. It is a special law and must stand or fall as viewed in that posture.

Id, at p. 229, 319 S.E.2d 824.

As we stated in Lasseter,

> In so viewing the statute, we first note that the constitution does not prohibit special laws per se. The legislature may enact special laws affecting special classes, but it cannot do so if it has previously legislated in that area by general law nor may it do so if the classification of those affected is unreasonable. The preemption is expressly covered by [Art. 3, Sec. 6, Para.4 of the Constitution of Georgia of 1983.] The requirement of reasonable

> classification comes from the equal protection guarantee. Art. 1, Sec. 1, Par. 2, 1983 Georgia Constitution.

Id. at pp. 229-30, 319 S.E.2d 824.

This act singles out for special treatment property claims against manufacturers and suppliers of asbestos and differentiates them from all other claims that might be based upon other hazardous or toxic substances. Because we do not find this separate classification to be reasonable, the statute does not meet constitutional standards.

In light of this disposition, we answer the certified question in the negative.

CERTIFIED QUESTION ANSWERED.

All the Justices concur except HUNT and BELL, JJ., who dissent and GREGORY, J., not participating.

HUNT, Justice dissenting.

I respectfully dissent. As the majority acknowledges, the legislature may enact special laws if the classification of those affected is reasonable.

Accordingly, we have consistently upheld special laws where there is reasonable justification for the law. See, e.g., Lasseter v. Ga. Public Service Commission, 253 Ga. 227, 319 S.E.2d 824 (1984) (coal conversion statute applicable to particular class of power plants created reasonable classification); McAllister v. American National Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977) (statute requiring showing of negligence in sale of blood was reasonable); C & S Natl. Bank v. Mann, 234 Ga. 884, 218 S.E.2d 593 (1975) (statute classifying married women whose separate estates consist of real property and/or intangible personal property differently from married women whose separate estates consist of tangible property); Black v. Blanchard, 227 Ga. 167, 179 S.E.2d 228 (1971) (statute providing exemptions for certain individuals running for office of school superintendent established reasonable classification).

It is undeniable that asbestos in buildings presents significant health and economic problems.

The legislature of Georgia, like that of several other states, including Massachusetts, New York and Minnesota, chose to respond to some of these problems by enacting a statute which would lift a statute of limitation bar to asbestos-related property damage suits. I do not believe we can legitimately label this statute unreasonable, particularly in light of our duty to construe a statute as constitutional, where possible. While the court may not agree with the wisdom of the statute, we are not authorized to second guess the legislature. I would hold the statute is not prohibited as a special law, and is not otherwise invalid, and would answer the certified question in the affirmative.

I am authorized to state that Justice Bell joins in this dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8140

D.C. Docket No. 186-047

ST. JOSEPH HOSPITAL,
Plaintiff-Appellee

V.

The CELOTEX CORPORATION, as Successor
to the SPRAYCRAFT CORPORATION
(a Delaware Corporation),
UNITED STATES GYPSUM COMPANY
(a Delaware Corporation),
Defendants-Appellants.

JUNE 6, 1989

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for entry of judgment for defendants, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered June 6, 1989

For the Court: Manuel J.
Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8140

ST. JOSEPH HOSPITAL,
Plaintiff-Appellee

V.

The CELOTEX CORPORATION, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION(S) OF
REHEARING IN BANC

(Opinion June 6, 1989, 11 Cir. 198__, ____ F.2d ____)

(September 15, 1989)

Before VANCE and CLARK, Circuit Judges and GARZA*, Senior Circuit Judge

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* Hon. Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Courtbe polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not

having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/R.S. Vance
United States Circuit Judge